

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL **74-2243**

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

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PATRICK DEMAURO,

*Plaintiff-Appellee,*

*against*

CENTRAL GULF SS CORP.,

*Defendant and Third Party*

*Plaintiff-Appellee-Appellant*

*against*

INTERNATIONAL TERMINAL OPERATING  
CO., INC.,

*Third Party Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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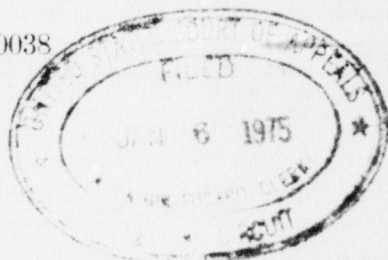
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**BRIEF OF DEFENDANT AND THIRD-PARTY  
PLAINTIFF-APPELLEE-APPELLANT**

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### CASE CITED

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## **BRIEF OF DEFENDANT THIRD-PARTY PLAINTIFF-APPELLEE-APPELLANT**

During the course of the trial of this case one indisputable fact was shown. Cases of cargo which had been stored aboard the SS "Green Port" fell while the #4 lower tween deck was being discharged and as a result plaintiff suffered injury.

### **The Issues of Negligence, Contributory Negligence and Unseaworthiness**

Following all the testimony of witnesses it became apparent that there was not a scintilla of evidence to support the defendant's affirmative defense of contributory negligence and therefore the defense was withdrawn by the defendant. Third-party defendant's counsel voiced no objection although he had an absolute right to be heard in regard thereto. Upon withdrawal of the defense of contributory negligence, plaintiff withdrew that cause of action in the complaint which sounded in negligence.

Therefore, in the case of plaintiff against defendant, there remained before the Court only the issue of the vessel's unseaworthiness.

Plaintiff's counsel moved the Court for a directed verdict on the issue of unseaworthiness of the vessel and, based upon testimony presented, the Court rightfully determined as a matter of law that the vessel was, in fact, unseaworthy, and that there was no factual issue for consideration and determination by the jury. Counsel for third-party defendant again did not voice objection or exception to the Court's granting of plaintiff's motion for judgment on the issue of unseaworthiness.

The only issues remaining for the jury's consideration were:

- 1) damages
- 2) the issues raised by defendant third-party plaintiff against third-party defendant

## **THE BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT**

### **Third-Party Defendant's Point I**

In regard to Appellant's Point I, the Court's granting of plaintiff's motion on the issue of unseaworthiness, there can be no question but that the vessel was unseaworthy at the time of plaintiff's accident. There can be no question but that on the morning of March 31, 1971 a condition which can most easily be described as "unstable cargo" existed in the lower tween-deck level of the SS "Green Port". These facts are uncontested.

In regard to the argument on the issue of plaintiff's contributory negligence it was withdrawn without objection of third-party defendant and there was not any testimony, not a scintilla of evidence for a jury to consider if, in fact, the defense had not been withdrawn.

Third-party defendant's argument in support of the withdrawn defense of contributory negligence boils down to the fact that plaintiff was at the scene of the accident when he was injured and therefore may have been guilty of contributory negligence.

### **Third-Party Defendant-Appellant's Point II**

Defendant third-party plaintiff respectfully requests that it be permitted to adopt the argument of third-party defendant-appellant in regard to the excessiveness of the jury's award.

### **Third-Party Defendant-Appellant's Point III**

Again in this point, precluding conduct of defendant, Appellant's counsel attempts to reargue a factual issue which was presented to the jury through the Judge's charge (598A) and determined favorably to defendant third-party



plaintiff. In regard to this portion of the Judge's charge, no exception was taken.

There is more than sufficient testimony to negate Appellant's position. The witness, Mr. Victor Pinto described as "Safety Man" for third-party defendant, testified that on the morning preceding the accident he inspected the cargo in #4 lower tween deck and it was, in his opinion, properly stowed and absolutely safe for the longshoremen to work (394-395). He found it properly shored and secured. The following day, prior to the accident, the particular cases of cargo according to the testimony of fellow longshoremen (Vosk, Pratt, Goch, Menosky) were unshored and not secured. It was contended by third-party plaintiff and apparently accepted by the jury, that the shoring had, in fact, been in place the day before, but had been removed by stevedore employees prior to the accident. In addition to Mr. Pinto's testimony, two expert witnesses, Mr. William Wheeler, for defendant third-party plaintiff, and Mr. Paul J. Keeler, for third-party defendant, were in agreement that the cargo was almost certainly properly secured during the vessel's voyage from the west coast to Bayonne, New Jersey, but, nevertheless, at the time of the occurrence the cargo was not in fact properly secured and apparently the jury concluded that it was unstable and unshored by or through the actions of the longshoremen.

Both experts testified that the cargo in question, in accordance with good stevedore practices, could have been shored and secured either with fencing and shoring or by support with lateral cargo. In this case, all the palletized cargo was stowed along the athwartship cargo fence and other cargo which had been stored in the square of the hatch had been removed prior to the accident. Both men went on to say that good stevedore practices would also require that, after the removal of the supporting lateral cargo, the boxes in question be either removed and placed on the deck for removal from the ship forthwith or be

secured in some manner before going ahead with the removal of the remainder of the lateral cargo along the athwartship bulkhead. By the testimony in the case of Mr. Goch, Mr. Menosky and Mr. Vosk, and the plaintiff, neither of these procedures were followed. Mr. Wheeler and Mr. Keeler also testified that the ship's officers on watch during discharge operations being conducted by independent stevedores would not, by custom and practice in the shipping trade, enter the hatch being discharged or in any way enter into the discharge operations unless they were notified by the stevedore of a condition which required their attention. It is well established in this Circuit and elsewhere that the stevedore's warranty of workmanlike service encompasses the duty, once a dangerous condition is known either actively or constructively, to either correct the condition or discontinue work until the dangerous condition is made reasonably safe. Furthermore, the breach of this duty casts liability on the stevedore for indemnity of the shipowner. *Caputo v. United States Lines, Co.*, 311 F2d 413, 415 (2 Cir.), cert. denied, 374 U.S. 833.

Knowledge of the dangerous condition on the part of the stevedore sufficient to give rise to indemnity to the shipowner may be either actual or constructive.

Differentiating and distinguishing the facts of this case from those in the cases cited in third-party defendant's brief, Point III, regarding preclusionary conduct, it was the testimony of third-party defendant's Safety Director, referred to above, that the cargo in question was properly shored and secured the day prior to the accident. Furthermore, it was the testimony of third-party defendant's expert witness, Mr. Keeler, and the testimony of defendant and third-party plaintiff's expert witness, Mr. Wheeler, that the dangerous condition of the tiered cargo could have been brought into play by the removal of the lateral support cargo by the third-party defendant stevedores and that the actions which created and brought into play this

dangerous condition occurred while the discharge operations were under the control, by custom and practice, of the third-party defendant stevedore. All this testimony was presented to the jury and the question of preclusionary conduct on the part of the shipowner was clearly presented to it by the Judge's charge. There was ample evidence presented at trial to support the jury's determination regarding lack of preclusionary conduct on the part of the defendant third-party plaintiff and the jury's determination should, therefore, not be disturbed.

### **Third-Party Defendant-Appellant's Point IV**

Third-party defendant's contention that the jury's verdict on the third-party complaint was against the weight of the evidence is completely without merit.

It is stated that there are only two possible versions of how the accident could have happened and that the version by DeMauro and his witnesses was incredible and that ITO's version is the only logical version. Yet even ITO's version as pointed out above, sufficiently creates an issue as to the condition of the stowage of the cargo upon the vessel's arrival and the changed condition of the cargo immediately before the accident. It is argued that the cases which fell "must have been braced or secured in order to survive the rough voyage and arrival in Bayonne in this position". Counsel argues, therefore, that there is no testimony upon which an inference could be based that ITO had removed the shoring that was bracing and holding this case. Yet, the third-party defendant, itself, presented Mr. Pinto as a witness to testify to the condition before the accident and the plaintiff's witnesses, who were in the hold prior to and at the time of the accident testified to the existence of the changed condition. He argues that there is no proof that longshoremen removed the shoring of the cases of cargo prior to the plaintiff's accident yet it has been clearly established



that they were shored before and unshored at the time of the accident. Further evidence was introduced from which the jury would necessarily have been able to conclude that any alteration would have had to have been affected by the longshoremen into whose custody the lower tween deck of No. 4 hatch had been placed for purposes of discharge.

The jury's verdict is amply supported by the record.

### Conclusion

The Court acted properly in directing a verdict for plaintiff on the issue of unseaworthiness after the defense of contributory negligence had been withdrawn without objection by third-party defendant and the remaining issues were purely factual and properly within the province of the jury according to the law as charged by the Court.

Respectfully submitted,

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Third-Party Defendant-  
Appellant.

State of New York,  
County of New York,  
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes  
and says that he is over the age of 18 years. That on the 6th  
day of January, 1975, he served two copies of  
Brief of Defendant and Third-Party Plaintiff-  
Appellee-Appellant on Zimmerman & Zimmerman  
on the attorney s  
for Plaintiff-Appellee  
by delivering to and leaving same with a proper person in charge of  
their office at 160 Broadway  
in the Borough of Manhattan, City of New York, between  
the usual business hours of said day.

*David F. Wilson*

Sworn to before me this

6th day of January, 1975

*Courtney J. Brown*

COURTNEY J. BROWN  
Notary Public, State of New York  
No. 31-5472020  
Qualified in New York County  
Commission Expires March 30, 1976